Supreme Court of the United States.

OCTOBER TERM, 1897.

THE SMITHSONIAN INSTITUTION, *Appellant*,
vs.
LEVI W. MEECH, *et al.*, *Appellees.*
} No. 191.

APPELLANT'S BRIEF.

The appellant is devisee under the will of Robert S. Avery, who died at Washington, D. C., 12th September, 1894, leaving all his property, real and personal (after payment of a few legacies), to the Smithsonian Institution, in trust for the furtherance of certain scientific researches. The testator names lot 2, in square 787, in the City of Washington, as included, which though standing in the name of his wife, he declares to be his property.

Mrs. Avery died 18th November, 1890, in a house upon Capitol Hill, where she and her husband had resided for many years. The appellees, three brothers and one sister, are her heirs-at-law.

Mr. Avery had bought this lot in 1885, with his own money, to please his wife, He directed that the deed should be made out in her name. This was done upon her agreement at the time to make a will, so that in the event of his surviving her the lot would be his, to go like the rest of his property to the Smithsonian Institution. It does not appear whether the will was to be made directly in his favor; or, the devise to be to him for life with remainder to the Institution.

Mrs. Avery postponed executing her will, though she frequently expressed an intention of making one, and talked with a lawyer about it. She died suddenly without having made a will. Before purchasing this lot Mr. Avery had executed his will, giving everything (except a few legacies), to his wife for life, and upon her death to the Smithsonian Institution. This fact Mrs. Avery knew at the time when, in view of the purchase of the lot in question, she agreed to make her will as above stated.

They had no children.

Upon Mr. Avery's death, the Smithsonian Institution filed a bill in equity reciting the circumstances of the purchase of the lot, and the agreement between husband and wife in relation thereto, and setting forth that defendants claimed the lot as heirs-at-law, and that they, with knowledge of the facts, had demanded possession. The bill sought a perpetual injunction against defendants. It asked that a legacy of $1,000 to defendants, given to them on condition that they acquiesce in the will, be declared forfeited.

The Supreme Court of the District of Columbia (HAGNER, J.) entered a decree in favor of the plaintiffs. Upon appeal, the Court of Appeals decided that the testimony failed to convince them that the parties intended a trust in favor of the husband; and they reversed the decree below. The Smithsonian Institution, 20th May, 1896, took an appeal to this court.

STATEMENT OF FACT.

Robert S. Avery for thirty-two years was employed in the Coast Survey, and latterly had held the responsible position of Chief of the Tidal Division. Here he devised new methods of observing the tides, and introduced an improved system of classifying the results so obtained.

Both Mr. Avery and his wife chose to live apart from society. Practising strict economy, and making almost no

acquaintances, this couple in their seclusion came to be something of a mystery to their neighbors. By some people they were looked upon as "peculiar and eccentric." (Rec., 27.)

The only person, it seems, whom they cared to admit to their intimacy was Mr. Shidy, a gentleman by many years their junior. Mr. Shidy entered the Coast Survey in 1873 at the age of twenty-two. Working under the eye of Mr. Avery he attracted the attention of his chief, who appears to have taken a liking to him. It resulted in Mr. Shidy's becoming a frequent visitor at the Avery house. Later he was rewarded with their whole confidence. He would frequently dine there, and when Mr. Avery's duties took him out of the city Mr. Shidy would stay at the house as a guest for even a month at a time.

Mr. Avery knew nothing of business. He contrived to save money, but he showed little wisdom in investing it. As they had no children they resolved that the property accumulated by Mr. Avery should be applied to the cause of science.

In the spring of 1885 Mr. Avery had some money to invest, and he consulted with his wife as to where to put it. At this time Mr. Avery was 77 years of age, his wife about 57. They took Mr. Shidy so far into their confidence as to discuss many times the subject, in its various bearings, in his presence (Rec., 41). They considered the advisability of buying the house and lot now in controversy, which (except for a vacant lot between) was next door easterly of the house in which they lived.

It appears that Mrs. Avery had been annoyed by former tenants of that house, and she thought if Mr. Avery were going to buy the lot the deed might well be put in her name, so she would control it. Besides, as Mr. Avery was advanced in years, and his health not of the best, it was almost certain that she would outlive him. It would be better, therefore, to have the title in her name, rather than in his name (Rec.,

41). For some reason she thought it would be pleasanter to have it in her name, and he was willing to please her (Rec., 46). They came to an understanding "that the property was to be her's during her lifetime, and was to be disposed of at her death in accordance with the will of Mr. Avery with the rest of his property" (Rec., 42). Mr. Shidy, who testifies as to these conversations, when asked why the property was to go to the Smithsonian, says:

"The reasons assigned seemed to be that the property was bought and paid for by Mr. Avery's money, and he was anxious that the fund he should leave for the benefit of science should be [as] large as possible so as to be as beneficial as possible for the purposes for which he left it, and he did not contemplate that it should be diminished by the amount of money invested in this property in any way." (Rec., 42.)

Mrs. Avery on various occasions spoke of making a will to carry out this agreement (Rec., 43).

Mr. Hazelton, who drew the deed, testified that Mr. and Mrs. Avery came to his office together. Mr. Avery paid the money and took the deed to put it on record (Rec., 21, 22). Six hundred dollars of the purchase money was retained to pay a note that a deed of trust on the land had secured. Later Mr. Avery paid this note (Rec., 37, 38).

The only writing to be found bearing on the transaction was a copy of what purported to be a note dated October 26, 1885, addressed to Mr. Hazelton, the grantor's attorney, which reads thus:

"*We* loaned $12.50 . . . please make it right to *us* . . . please send the papers, they are invaluable to *us*.

MRS. L. T. AVERY.

"Mrs. Avery wishes you would oblige *us* just now, if you can arrange with the bearer, Mr. R. S. Avery. Perhaps some time *we* may be of service to you. The money and papers are valuable to *us* just now. L. T. AVERY." (Rec., 44.)

(The italics are ours.)

Mr. and Mrs. Avery had consulted with Mr. John F. Cox, a member of the Washington bar, about their affairs. Both husband and wife talked freely with Mr. Cox, each in the other's presence, of the disposition to be made of their property after their respective deaths. Mr. Avery gave Mr. Cox a rather full history of the pieces of property he had acquired through the money he had earned in the Coast Survey. Of the lot in suit, he said (Mrs. Avery as usual being present,) that he had permitted Mrs. Avery to take it in her own name. Mrs. Avery said the same thing; that it was their intention at their death to let the survivor enjoy the property which Mr. Avery had, and she had during his or her life, and at his or her death it was to go to the Smithsonian Institute (Rec., 29). She regarded this property that she held only in trust, as it were (Rec., 29). She said that her husband had permitted her to take the property in her own name, and that she wished to make a will which would follow out his intentions as to his own property (Rec., 32).

Mrs. Avery appears (Rec., 32) to have put off making her will, thinking that she was sure to outlive her husband (Rec., 43). She died (1890) nearly four years before he died.

Upon her death, Mr. Avery employed Mr. Cox to draw up five affidavits of persons who knew the facts relating to the putting of the lot in the name of the wife (Rec., 30). It was intended to have these affidavits recorded in the Registry of Deeds, but it was found that they could not be admitted to record (Rec., 31). The affidavit of Mr. Avery himself will be found at page 31 of the Record. It was offered in evidence, not to prove the facts therein stated, but as tending to show that Mr. Avery upon the death of his wife claimed the property as his own.

The testator named his niece, Julia N. Avery, as executrix. He gave certain legacies to his relatives, and to relatives of his wife, equalizing the gifts substantially. "These bequests," he adds, "are all made upon the condition that

the legatees acquiesce in this will, and I hereby bequeath the share or shares of any disputing this will to the residuary legatee hereinafter named" (Rec., 7).

In Mrs. Avery's lifetime her husband let the premises in question to a tenant for years in his own name. The tenant paid the rent to Mr. Avery in the presence of Mrs. Avery, and he invariably receipted for the payment in his own name, in her presence. This went on for five years (Rec., 25). To the tenant Mrs. Avery repeatedly said that the property was bought with Mr. Avery's money (Rec., 26). According to this witness (Col. Bumpus) Mrs. Avery repeatedly said, "that Mr. Avery and she proposed to leave whatever they had at their death to the Smithsonian Institute to establish an 'Avery Fund' in the interest of science, and that whichever one died first the other one was to carry out the wishes of the two, that everything they had was to be left to the Smithsonian Institute" (Rec., 26).

As already intimated, Mr. Avery had possession of the premises for four years after the death of his wife. Upon accepting the tract the Smithsonian Institution took possession, and it was not till 23d May, 1895, eight months after the death of Mr. Avery, that the heirs-at-law of Mrs. Avery demanded of the Institution a surrender of its possession. They do not deny that they had knowledge of the facts under which Mrs. Avery gained title; nor that they knew the contents of the affidavit of Mr. Avery, which the Institution caused to be put on record 15th May, 1895. (Rec., 5, 18.)

The complainants took testimony. The only evidence offered by defendants was a copy of a transcript from the books of a Savings Society in Norwich, Connecticut, showing a balance of $997.39 to the credit of Mrs. Avery (Lucy T. Meech), 1 July, 1890, the accumulations of a fund that exhibits no diminution in 1885, or immediately thereafter, when the lot in question was purchased.

The cause was heard on bill, answers and testimony, Julia N. Avery, executrix, having answered as a party defendant.

The Equity Court (HAGNER, J.,) allowed the prayers of the bill. The decree (Rec., 58, 59), declared the title to be vested in plaintiffs, enjoined the defendants, heirs-at-law of Mrs. Avery, from asserting title, and ordered them to execute a conveyance by way of quitclaim and release. It directed the executrix to treat the $1,000 bequest as having fallen into the residuum for breach of condition, unless defendants should within sixty days relinquish in writing their claim to the premises (Rec., 58, 59).

On the same day that the decree was entered (27 January, 1896), defendants took an appeal, thus refusing the privilege held out by the decree of averting a forfeiture of the legacy. Since they did not comply with the requirements of the decree within sixty days, the decree became absolute (Rec., 67).

The Court of Appeals reversed the decree, and remanded the cause with directions to dismiss the bill. From the opinion (MORRIS, J.), it appears that the Court were not satisfied that the parties at the time of the conveyance intended that a trust should exist (Rec., 71–75).

The Smithsonian Institution entered an appeal to this Court, 20 May, 1896.

SPECIFICATION OF ERRORS.

The decree of the Court of Appeals (Rec., 75), is erroneous, because:

1. It reverses the decree of the Supreme Court of the District of Columbia (Rec., 56–57).

2. It directs the Supreme Court of the District of Columbia to vacate its decree, and dismiss the bill.

a. The opinion of the Court shows the decree to be erroneous, because based upon the ground that:

i. It is not satisfactorily proved that the money paid for the property in question was the money of Robert S. Avery, the husband (Rec., 73).

ii. The testimony shows that no trust was intended or contemplated by the parties (Rec., 74).

iii. There was "no disputing of the will," and the legacy of $1,000 to the heirs of Mrs. Avery, has not been forfeited.

POINTS OF LAW.

I.

The defendants not having denied the fact of the express agreement between Mr. Avery and his wife, cannot take advantage of the statute of frauds, since they do not set up the statute in their answer.

Following the line of the opinion of Mr. Justice HAGNER, we did not seek to have that decision affirmed in the Court of Appeals by arguing that the trust was an express trust capable of being proved by parol. Our agreement was directed to satisfying the Court that a trust existed which by operation of law was excepted out of the statute, and therefore valid.

The appeal brings up the whole record of bill, answer and testimony, and entitles us to a rehearing, as of a trial *de novo*. We desire therefore to make a point, preliminary in its nature, to the consideration of the argument as presented by us below. (*Watts* v. *Waddle*, 6 Pet., 402.) We respectfully submit that the appellants are not entitled to rely on the statute of frauds. They did not plead it; nor have they denied the existence of the agreement between Mr. Avery and his wife upon the faith of which he parted with his money and purchased the land in question. This is apparent upon the record.

Our bill sets forth the fact of such an agreement as follows (Rec., 5):

"The plaintiffs aver the fact to be that at the time of the purchase of this property by Mr. Avery it was expressly agreed by and between himself and his wife that said premises were to be deeded to her, not to give her the fee-simple

title to the same, nor even to give her a life interest absolutely therein, but solely for the purpose of providing for her in the event of her husband dying before she should die, as that appeared almost certain would happen; and that Mrs. Avery was to make her will giving the same to her husband, so that the general purpose of his will should apply to this after-acquired real estate."

The defendants' answer does not traverse this allegation of fact. All that they plead, in response to our averment, is as follows (Rec., 17, 18):

"They have no personal knowledge of the fact, as alleged in the bill, that at or about the time of said purchase there was an understanding or agreement, verbal or otherwise, between the said Lydia and her said husband; that the said real estate was to be held by said Lydia in any other way than upon the terms expressed in the said deed of conveyance to her, and if said alleged fact be true and relevant they demand strict proof thereof."

This, it is needless to say, is not a denial. Nothing is here stated as to the defendants' belief. They only aver that they have no personal knowledge of the agreement. (*The Holladay Case*, 27 Fed. Rep., 841.) Under the code in Ohio, where a defendant answered that he cannot admit or deny the same, but demands proofs thereof, it was held that the answer was not a denial of the fact, and did not put plaintiff on his proof. *Building Association* v. *Clark*, 43 Ohio St., 427.

The defendants "demand strict proof." We do not contend that the doctrine of the Ohio case applies, and that by their form of pleading they admit our averment; but we do say that this is not such an affirmative plea as lets in the defence of the statute of frauds.

Although the subject is involved in much confusion, owing to contrariety of decisions, the general rule may be stated as this: A defendant must plead the statute of frauds if he would avail himself of its privileges.

The rule in equity in New York was early announced by WALWORTH, chancellor, and is frequently quoted as follows:

"If it is stated generally that an agreement or contract was made, the Court will presume it was a legal contract, until the contrary appears, and the defendant must either plead the fact that it was not in writing, or insist upon that defense in his answer." *Cozine* v. *Graham* (1830), 2 Paige, 181.

Chancellor BLAND (1827), thus states the rule in Maryland, as deduced from the English authorities:

"If a defendant makes his defense without expressly denying the whole contract, or in any other form, without relying upon the Statute of Frauds, he thereby tacitly waives its benefit, and cannot be permitted to take advantage of it afterwards or at the final hearing; so that if the contract should be sufficiently sustained by parol proof, the Court will grant relief, although written evidence of no part of such contract may have been produced." *Lingan* v. *Henderson*, 1 Bland., 248.

An exception, however, appears of late years to have been engrafted upon the rule in some jurisdictions. There are authorities which hold that where a defendant in his answer *denies the agreement*, he may avail himself of the statute, though he has not pleaded it.

The English Chancery decisions, would seem, however, not to sustain this exception. The latest edition of *Daniel's Chancery Practice*, Vol. 3, p. 2,117, note, says: "If a defendant does not insist by his answer upon the benefit of the statute of frauds, he cannot avail himself of its provisions at the hearing, although he denies the agreement set up by the bill," citing *Clifford* v. *Turrell*, 1 Y. & Coll., C. C., 138, and *Baskett* v. *Cafe*, 4 DeG. & S., 388. In the former case, counsel agreed at bar that such was the rule.

In *Skinner* v. *McDougal*, 2 DeG. & Sm., 265, the bill was

for specific performance. Defendant alleged that no formal note of agreement ever existed. But he did not expressly claim the benefit of the statute of frauds. *Held*, he was not entitled to benefit of the statute.

This Court has not authoritatively ruled upon the point, although it seems to have been brought under consideration briefly in the opinion of Mr. Justice BRADLEY, in *May* v. *Sloan*, 101 U. S., 231. That was a bill to compel a conveyance. The opinion finds that the alleged parol agreement to convey was not proved, and the decision is based upon the construction of another agreement, which was in writing. The court remarks that *if* the case depended upon the parol agreement, the statute of frauds would be a bar. "The defendant in his answer denies that any such agreement was made. Such a denial is as effective for letting in the defense as if the statute of frauds had been pleaded. *Sugden, Vendors and Purchasers*, 150, c. 4, sect. 6, par. 5." Page 237.

(The citation as printed in the report we have been unable to find in Sugden.)

In a subsequent case, Mr. Justice WOODS cites *May* v. *Sloan* as decisive of the point in question. *Dunphy* v. *Ryan*, 116 U. S., 496. But the report of the case does not show that the point was argued, or in any manner brought to the attention of the Court.

Even if we were to assume that the Supreme Court of the United States has given its deliberate sanction to a rule of practice that has not the weight of authority elsewhere to uphold it, we may observe that the rule itself goes no further than to give efficacy to a denial under oath by a defendant who is alleged to have been a party himself to the agreement. He is presumed to know what is the fact, and his denial makes it needful for the plaintiff to bring forward the testimony of two witnesses to overcome it. Such is not the character of the defendants' answer in the case at bar. They say they have no knowledge, and they do not state what is

their belief, as to the agreement. See language of Mr. Justice CLIFFORD in *Brown* v. *Peirce*, 7 Wall., 212.

If the rule is to be treated as established in the courts of the United States it must be justified, we submit, upon the ground that a denial under oath of a contract by one of the parties thereto is equivalent to an affirmative plea on his part that no such contract (capable of being enforced) ever existed. In other words, the denial may be regarded as practically setting up the statute. Such a rule does not benefit these appellants.

II.

The claim of the heirs-at-law of the wife to possession is against equity and good conscience. The husband bought the lot with his money; and both husband and wife intended that an equitable estate should remain in the husband, so that the lot should pass by his will to the Smithsonian Institution.

Before citing authorities, we wish to make it clear to the court that Mr. Avery paid for the land out of his own savings.

THE HUSBAND'S MONEY BOUGHT THE LAND.

The testimony on this point is positive and uncontradicted. But the opinion of the Court of Appeals, it seems, expresses a doubt:

"The testimony of all the witnesses for the appellee [The Smithsonian Institution,] except one, simply tends to prove that it was the money of Robert S. Avery, and not that of his wife, that was paid for the property in question. But we assume this to have been the fact, although we do not by any means regard it as satisfactorily proved." (Rec., 73.)

Let us therefore briefly review what the witnesses have testified to on the subject.

Mr. Hazelton, attorney for the grantor (Sands), says:

"Mr. Avery delivered the money on my table, and it was counted there, and they took the deed and went away." (Rec., 22.)

"*Cross-Ex.* I think you stated in your testimony-in-chief, that they took the deed and went away. Who do you mean by 'they?'

"A. I mean that the deed was given to Mr. Avery."

Lorenzo D. Bumpus, who was Colonel of the 57th Pennsylvania during the war, says:

"Mrs. Avery told me in my house and in her house and in his presence repeatedly that the property was bought with Mr. Avery's money." (Rec., 26.)

Col. Bumpus and his wife, it will be borne in mind, occupied the premises in controversy for five years or more (Rec., 25), as a tenant under a lease from Mr. Avery.

Mrs. Bumpus testifies:

"Q. Did she ever say anything to you about how the money was obtained with which that property was bought where you lived?

"A. Well, she used to say that it was Mr. Avery's money; that he had earned the money, and she claimed the property he had bought.

"Q. How did she say he had earned it?

"A. Well, I guess in the Coast Survey. I believe that is where he worked the greater part of the time.

"Q. I meant with reference to the size or amount of the money.

"A. I could not say how he got the money.

"Q. You say that she claimed the property. What was her language?

"A. She said that Mr. Avery had bought the property and told her she could have it, and she always said to me that it was her property." (Rec., 27.)

Mr. Brush testifies that Mr. Avery paid the $600 note that formed a part of the consideration money. (Rec., 37, 38.)

Mr. Shidy, who had a thorough acquaintance with the whole transaction, says, "Mrs. Avery" (he is speaking of a discussion in his presence just previous to the purchase) "thought it would be best to put the deed in her name, although her husband's money was paying for it exclusively." . . (Rec., 41.)

. . "The property was bought and paid for by Mr. Avery's money." . . (Rec., 42.)

This gentleman made an affidavit after the decease of Mrs. Avery.

On cross-examination as to the object of making an affidavit, he is asked:

"Q. He [Mr. Avery,] stated to you that he desired to establish the fact that it was his money that had purchased it, and his desires and his wife's desires in regard to the property?

"A. Yes; that it should go as the rest of the property goes." (Rec., 49.)

Mr. John F. Cox, a lawyer of Washington, who was consulted by Mr. and Mrs. Avery, and to whom in each other's presence they talked with the utmost freedom as to this piece of property, corroborates what Mr. Shidy says. Two or three times he speaks of Mrs. Avery, saying that her husband had "permitted" her to take the property in her name. He says distinctly:

"She always spoke about it as property which had been bought with the money that he had saved, and she always gave him great amount of praise for the economy which he had exercised in the early history of his life." (Rec., 29.)

We have good reason, therefore, to maintain, in the words of Mr. Justice HAGNER, that—

"It is satisfactorily proved in this case that the entire purchase-money for the A street property was derived by the husband from his own earnings, and in no degree from any property or funds of the wife." (Rec., 61.)

DID NOT INTEND TO MAKE A GIFT TO HIS WIFE.

1. Having proved that the husband paid the purchase money at the time he directed the deed to be made in the name of his wife; let us look at the evidence that Mr. Avery did not intend to make a gift of this lot to his wife.

Upon familiar principles a trust results between strangers upon payment of purchase money by one and placing title in another. In the instance of husband and wife, however, the presumption of an intention to benefit the real purchaser ceases, and the law takes the transaction to be meant as a gift or settlement.

The question is what was the *intent* that controlled the parties at the time the deed was delivered. The presumption that Mr. Avery intended a gift to his wife may be rebutted by parol proof. *Livingston* v. *Livingston*, 2 Johns. Ch., 537; *Sherman* v. *Sherman*, 20 D. C., 330.

Whether a purchase in the name of a wife is a settlement or not is a question of pure intention, though presumed in the first instance to be a provision and settlement; but any antecedent or contemporaneous acts or facts may be received either to rebut or support the presumption. *Persons* v. *Persons*, 25 N. J. Eq., 250, citing *Perry on Trusts*, §§ 147, 148; *Peer* v. *Peer*, 3 Stockt., 432; *Devoy* v. *Devoy*, 3 Jur. N. S., 79; *Stone* v. *Stone.*, *Id.*, 708; *Sidmouth* v. *Sidmouth*, 2 Beav., 447; *Christy* v. *Courtenay*, 13 Beav., 96; *Williams* v. *Williams*, 32 Beav., 370.

The nature of the proof required to establish a resulting trust in favor of a husband, is concisely stated in a carefully considered opinion recently announced by the Supreme Court of Rhode Island, as follows:

(1) That the husband paid the purchase money.

(2) That he *did not intend* the conveyance thereof to his wife to operate by way of advancement, there being a presumption that it was so intended when a husband pays for real estate and takes a deed to the wife. Per TILLINGHAST, J., *Hudson* v. *White*, 17 R. I., 522.

We cite this authority because it accurately sets forth the extent of the obligation resting upon a husband, after he has proved that he paid the purchase money. It will be sufficient in order to revive, as it were, a presumption of benefit to the real purchaser, that the judicial mind be satisfied that the husband *did not intend* to give the property to the wife.

From the nature of such a transaction, it is known ordinarily to a few persons only. In the present case, no question of creditors arises. Mr. Avery was not engaged in business, nor did there exist other than perfect harmony of purpose between his wife and himself.

Equity requires clear and convincing proof where a trust is sought to be established by parol testimony. There need not be many witnesses, but their testimony must be such as to compel belief.

SHIDY'S TESTIMONY CLEAR AND UNQUESTIONABLE.

We submit that full reliance can be placed in the deposition of the intimate friend of this married couple, Mr. Leland P. Shidy. For more than twenty-two years he had served in the Coast Survey. At work under Mr. Avery, he learned to estimate the ability and the worth of a man who to ordinary observers was an enigma. He entered into the simple life of these two people, and in the true sense of the word grew to be their friend.

Mr. Shidy is a witness of mental integrity. His replies, which indicate an apprehension of the exact limits of a question, are responsive and clear. He exhibits not a particle of

bias, and he uses words with a nice perception of their meaning. In fine, as we confidently submit, his testimony comes up to the standard which a court of chancery in cases of an alleged trust requires, namely, unequivocal and convincing proof.

The purchase of this house and lot, it seems, was determined upon after numerous discussions in Mr. Shidy's presence.

He gives us the substance of what was agreed upon. The leading feature was that the property, after they were through with it, should go with the rest of Mr. Avery's property to the Smithsonian Institution. It was Mr. Avery's money that was to buy the land, and it was their mutual desire that the fund which ultimately should be in the hands of the Institution as the "Avery fund," should be as large as possible; nor was it to be diminished in any way by the amount of money to be invested in this property. (Rec., 42.)

With this controlling purpose in view, Mr. Avery was willing that Mrs. Avery should have her wish gratified, and the deed be made out in her name. This proposed action was coupled, however, with the condition that Mrs. Avery was to make a will, giving her property to him, just as he had given his to her, it being understood that this would result in the Smithsonian Institution having the house and lot after their death.

Mr. Shidy, while under examination, was not asked whether the proposed will was to give the property to Mr. Avery, and stop at that; or, whether it was to give it to him for life, remainder to the Institution. Perhaps the witness could not have told just what it was agreed that the terms of the will should be; but from his testimony, as a whole, it is manifest that the understanding was substantially that Mrs. Avery should have no greater interest than an estate for life. It is not probable that they overlooked the contingency (which, to be sure, did not seem likely to happen) of Mr. Avery outliving her.

There is no reasonable doubt that they understood that *all* of the property saved by Mr. Avery, from the labor of so many years, was to go upon the death of the survivor as one gift to the Institution.

The court below appear to have reached the conclusion from the whole testimony that "not even a life estate was contemplated to be reserved to her husband in the event of his survival of her, for that event seems to have been considered highly improbable by both of them, in view of Mr. Avery's greater years and feebler health, although it was that event that actually occurred." (Opinion, Rec., 74.)

Mr. Shidy's language surely nowhere warrants this assumption. He says distinctly that the understanding was "that the property was to be hers during her life time, and was to be disposed of at her death in accordance with the will of Mr. Avery, *with the rest of his property*" (Rec., 42). This is entirely consistent with the idea that it was to go to the husband, if he outlived her, and then would pass under his will. The object of her making a will was to secure it against going to her heirs-at-law, and provide also that Mr. Avery should enjoy it so long as he lived.

COX CORROBORATES THE TESTIMONY OF SHIDY.

The testimony of Mr. John F. Cox settles the question, even if Mr. Shidy can be said to have left it in doubt.

Mr. Cox is an attorney-at-law. He was consulted by Mr. and Mrs. Avery, and the two talked with him upon this very subject, each in the other's presence, with nothing whatever to conceal, both having one purpose in view. Mr. Avery gives Mr. Cox a "history" of this purchase. It is not spoken of casually, but distinctly, so as to acquaint Mr. Cox with the facts—how it happened that the title was held by Mrs. Avery.

Mr. Cox testifies that Mrs. Avery said:

"It was their intention at their death to let the *survivor* enjoy the property which Mr. Avery had and she had, during his or her life, and at his or her death it was to go to the Smithsonian Institute." (Rec., 28.)

This was said as stating not an intention that came into existence after the deed had been executed, but an intention that formed an essential feature of the original transaction. It was given to the witness as a part of the "history" of the purchase of the property.

We will, a little later on, present the authorities to the point that Mr. Cox is a competent witness.

The intention of Mr. Avery and his wife, we submit, is proved beyond a reasonable doubt to have been that all the property was to be enjoyed by whichever one outlived the other, and then was to go to the Smithsonian Institution. It is equally apparent that the holding of the title by Mrs. Avery was not considered by either of them as a matter of very great consequence, since their minds were fully made up that the purpose Mr. Avery had at heart would be carried out, whoever held the title. So we see Mr. Avery making a lease in his own name, collecting rent and giving receipts therefor in Mrs. Avery's presence, precisely as if the property were his own. We see Mrs. Avery speaking of it in her note to Mr. Hazelton as if both were owners. These incidents furnish some slight additional evidence that the property was not given outright to Mrs. Avery.

THREE FOUNDATION FACTS FULLY PROVED.

Taking the proof as a whole, we respectfully submit that by unimpeachable testimony we have established the substantial facts set out in our bill, namely:

1. Payment of purchase money by Mr. Avery.
2. Mr. Avery did not intend to give the lot to his wife.
3. Mrs. Avery's ownership was only nominal; if it amounted to a life interest, the beneficial estate subject to that life interest remained in Mr. Avery.

To quote again Mr. Justice HAGNER:

"It is impossible to read the testimony in this cause without becoming convinced that the contentions of the complainants' bill truly represent the case." (Rec., 62.)

TRUSTS—RESULTING AND CONSTRUCTIVE.

2. The doctrine of a trust arising by operation of law in the case where A pays the consideration money and has the deed made to B, is familiar. Equity raises the presumption that A intends that B shall hold the legal title in trust for the benefit of A. The relation between the parties depends upon the intent with which the transaction has been effected. In the absence of testimony, equity raises a a presumption of fact in favor of A's being the true owner.

"The common law notions of title and ownership rested upon the observance of external forms. Equity first introduced the principle that in all the transactions of men concerning land—their transfers and bargains—the consideration is the essential fact which determines the real beneficial ownership, wherever the legal title may be vested." *Pomeroy's Equity Jurisprudence*, sect. 981.

An intent must necessarily have existed on A's part, for he is the actor; and if B is aware of the conveyance and assents thereto, it follows that an agreement between A and B has come into being—that B shall hold the legal title, while A enjoys the beneficial estate.

The trust here recognized by a court of equity has been called into existence really by the parties. The law does not *create* it. It is, therefore, in point of fact, an "express trust," in the sense of expressing the view taken by the parties of their mutual relation to the land. But usage has restricted the term "express trust" to a trust declared in words, which by the statute of frauds must be manifested or proved in writing. Other trusts are termed "implied," being founded on a presumed intention of the parties.

Still, this presumed intention is regarded as an expression of the will and desire of the parties at the time of the transaction. Hence, from a strict point of view, one might declare that in the purchase of land there is no such thing as a trust created by operation of law. It is created by the parties themselves upon a basis of fact.

There is a large class of trusts termed "constructive," and they may be defined as "founded neither on an expressed nor on any presumable intention of the party, but raised by construction of equity without any regard to intention, and simply for the purpose of satisfying the demands of justice and good conscience." *Abbott's Law Dictionary* (1879), Vol. ii, p. 610. Mr. Perry says of constructive trusts:

"They differ from other trusts in that they are not within the intention or contemplation of the parties at the time the contract is made from which they are construed by the court, but they are thrust upon a party contrary to his intention and against his consent." *1 Perry on Trusts*, sect. 166.

Perhaps it would prevent confusion and lead to a clearer conception of the true grounds of equity jurisprudence over the subject of trusts, were the term "constructive trusts" to be extended so as to embrace what are now termed "resulting trusts," since these latter trusts arise by the "implication or construction of law" within the meaning of the phrase as employed in the statute of frauds. Such use of the term has been at times resorted to. Washburn says:

"The term *constructive* trusts is sometimes used in a sense broad enough to embrace such as come properly under the head of *implied* or *resulting* trusts. But, properly speaking, constructive trusts are such as are raised by equity in respect to property which has been acquired by fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds the legal title."

In the same connection, Prof. Washburn speaks of "the control which courts of chancery exercise over equitable

estates, whereby in case of fraud, mistake or the like, they may require a grantee to hold subject to a trust in favor of the grantor in the nature of a resulting trust." *11 Real Property* (4th Ed.), p. 482.

That is to say, while the parties possess an intention, and have manifested it, yet equity establishes the trust and deals with it, not as the result of agreement, but as a creation of law. The intention is looked at as a part of the evidence, and the law does not raise the trust against the intention of the parties, unless equity and good conscience demand it. Then it will.

A resulting trust may thus *appear* to be created by the agreement of the parties; but on close examination we perceive that equity, in the due administration of its undoubted powers, creates or constructs it, precisely as it creates a constructive trust, just referred to. So it is entirely proper to consider "resulting trusts" as falling within the limits of the larger class of "constructive trusts."

EQUITY WILL PREVENT A WRONG.

The truth is, and every year's decisions serve to emphasize the fact, equity reaches out in all directions to do substantial justice, and to prevent the infliction of a wrong. As well expressed by CHURCH, C. J.,

"The general principles of equity and good conscience applied to certain situations and acts of the parties are used to raise presumptions of intention and to impress property with trusts and to clothe one party with the character and obligations of a trustee, and another with the rights and privileges of a *cestui que trust*, for the purpose of securing honesty and fair dealing among mankind and to prevent fraud." *Foote* v. *Bryant*, 47 N. Y., 544.

Where A has paid the purchase money and had the conveyance made to B, the question for a court of equity is not what is the extent of A's right, but can B keep the land against A's claim for it? Press this question home,

and it becomes clear that the ground upon which equity takes jurisdiction is to prevent injustice and fraud. This consideration brings a so-called resulting trust, as already suggested, within the well-defined meaning of a constructive trust, *i. e.*, a trust created by law.

This line of thought its not without its pertinency, since the opinion of the learned Justice of the Court of Appeals, we observe, deals with the subject of a resulting trust *in strictissimis verbis*, with no thought of applying the broader doctrine of a constructive trust to a proceeding by the heirs that surely is against equity and good conscience.

Mr. Justice HAGNER while sitting as Chancellor, is seen to have felt the force of this wider view of the case: "It is impossible to believe," he says, speaking of Mrs. Avery,

"she would ever have attempted to repudiate this agreement if she had survived the husband without ascribing to her a moral delinquency inconsistent with her other conduct in the transaction and her respect and affection for her husband. It cannot be doubted that if Mr. Avery had entertained the slightest doubt his wife would not carry out fully their cherished plan he never would have allowed the lot to be conveyed to her; or if such doubt had arisen after the execution of the deed that he would promptly have taken measures to enforce the performance of her pledges. To retain the title and repudiate this promise, under force of which it was obtained, would have been a fraud that equity would not have tolerated." (Rec., 64, 65.)

In this forcible language is pointed out the true ground upon which a decision of this case can be made to rest. The defendants who succeed to the strict legal title as heirs-at-law of their sister, are to be regarded in their present attitude as occupying the position that Mrs. Avery would have taken in her lifetime had she repudiated the agreement upon which she entered into possession; or had she attempted to dispose of the estate in fee to a stranger, in violation of the confidence reposed in her by her husband. We shall presently enlarge upon this point. Let us first,

however, enquire for a moment whether the doctrine of a resulting trust strictly so called, does not apply here.

NO OBJECTION THAT MRS. AVERY WAS TO ENJOY A LIFE ESTATE.

3. It was contended below that there could be no resulting trust in favor of the real purchaser, Mr. Avery, because the testimony showed that the grantee (Mrs. Avery) was to enjoy the property for her life. The trust created by operation of law, it was argued, is that the purchaser is immediately entitled to the beneficial estate, which here was to be Mrs. Avery's so long as she lived, a fact inconsistent with the implication of a resulting trust.

Possibly this contention grows out of a misapprehension of the requirement that the trust must result, if at all, at the instant that the deed is taken, and the legal title vests in the grantee. *1 Perry on Trusts*, sect. 133.

The same objection was urged in *Benbow* v. *Townsend* (1 Myl. & K., 506), that the equitable title raised by the parol evidence must be exactly commensurate with the legal title on the face of the instrument, to which the counsel for the opposite party replied, "There is no authority for that position." He cited *Madison* v. *Andrew*, 1 Ves. sen., 58, where a testator inserted his brother's name with his own in a lease of which he obtained a renewal, and as he alone paid the fines and rents and received the profits in his lifetime, it was contended in the suit for administration of his estate, that his brother was a mere trustee; but evidence being produced to show the testator's intention that his brother should have the benefit of the lease if he survived him, it was held that the resulting trust was sufficiently rebutted.

The Master of the Rolls (Sir JOHN LEACH,) though not making his decision turn on this point, said:

"In the case of *Lloyd* v. *Spillett* (2 Atk., 148), and also in the case of *Lane* v. *Dighton* (Amb., 409), it is expressly de-

cided that a resulting trust may be rebutted as to a part of the land comprised in a deed, and prevail as to the remainder; and if it can be rebutted as to part of the land there can be no reason why it may not equally be rebutted as to part of the interest in the land."

Mr. Justice Story, in his *Equity Jurisprudence*, lays it down as settled doctrine that "resulting or implied trusts in such cases may, in like manner, be rebutted as well to part of the land as to part of the interest in the land purchased in the name of another." Vol. ii (Ed. 1877), sect. 1202, p. 445, citing *Benbow* v. *Townsend* as authority.

We have been able to find no adjudicated case that controverts the view announced by the Master of the Rolls, and sanctioned by Mr. Justice Story. On the contrary, its soundness appears to have been taken for granted in more than one decision in this country.

A leading case is *Farley* v. *Blood* (1854), 30 N. H., 372. B, a husband, bought land in 1835 with his own money, and caused a conveyance to be made to F, who thereupon gave a bond to the wife of B to convey the land on request to her. She died in 1850, the husband and wife having occupied the place since its purchase. The evidence adduced to rebut the presumption of advancement to the wife showed that the intention of the husband was to limit the estate to the wife for life as a home for her. *Held*, in a contest made by heirs of the wife, that a trust resulted to the husband.

In *Booth's Appeal* (1868), 35 Conn., 165, brothers and sisters together purchased a piece of land in 1842, under a parol agreement among themselves that A, one of their number, should take the title and hold it in trust for the benefit of their mother during her life, and after her death for themselves. A, in 1843, conveyed the land to B, who had no knowledge of the trust, and B soon afterwards conveyed to C, one of the sisters, she agreeing by parol to carry out the original trust. In 1845 C sold the property to a

stranger, obtaining the price for the same which she held till her death, her mother receiving no benefit from it. In 1856 the mother died. In 1847 C married, and died in 1865. After her marriage, and within six years before her death, she repeatedly acknowledged her indebtedness to her brothers and sisters for their shares of the money received by her.

We are concerned chiefly with the views of the court as to the implied trust, involved in the transaction.

"When the actual agreement between the parties is identical with the agreement which the law will imply from the circumstances, as in this case, there can be no conflict, and no danger that the real intentions of the parties will be defeated by operation of law; such an agreement therefore will not defeat a resulting trust.

"The creation of such an express trust for Mrs. P. was the sole object and purpose of the arrangement, and so far as the agreement may be said to contemplate any further trust it had no other object or purpose than to secure to those who advanced the money their interest on the termination of the trust for the mother. So far then as there was any trust in favor of the heirs who advanced the money, it was such as the law would have implied, or would by implication have resulted to them from the mere fact that they furnished the money for that purpose." *Per* CARPENTER, J.

Compare *Robinson* v. *Leflore* (1881), 59 Miss., 148, where the court say:

"The resulting trust which arises in such a case from the facts and the relation of the parties is not destroyed by the verbal and therefore void contract that the lender of the money who attends the sale shall hold it in trust for her."

The point was expressly decided in Iowa, at a date when Judge Dillon and Judge Wright (afterwards Chief Justice) were on the bench, the opinion being delivered by BECK, C. J. In 1857 a husband bought land out of his own means and

had it conveyed to his wife, under an agreement with her that she would convey to him, or to whomsoever he might assign his interest therein, upon request so to do. Their object was to save costs and trouble, and to have the legal title vested in his wife in case he should die. They occupied the property as a homestead. The wife died in 1862. He brought a bill in equity against an adopted child having the rights of a child of the parties, to have title vested in him. The petition was dismissed below, but on appeal the court reversed the judgment.

One objection urged was that the petition showed the existence of an express trust, not in writing.

BECK, C. J. "It cannot be that the consent of the trustee to hold the title for the benefit of the *cestui que trust*, or an agreement so to do, in case of a resulting trust, will change its character. By an agreement the trustee simply assents to an obligation imposed by the law. The trust would exist without the agreement by operation of law. The agreement cannot destroy the effect of the conditions under which the law presumes the estate is held by the trustee." *Cotton* v. *Wood* (1868), 25 Iowa, 43.

The decision was undoubtedly right. The resulting trust had the effect to vest the beneficial estate solely in the husband, but so long as he did not ask his wife to convey the land such enjoyment of the beneficial estate by him remained suspended.

The fact that a party receiving a conveyance of land verbally agreed at the time with the person paying the consideration that the former should upon demand execute a conveyance to the latter of the premises, does not make the trust express as distinguished from one implied by law from the act of the parties, so as to exclude proof by parol. *Bayles* v. *Baxter* (1863), 22 Cal., 575.

A bill may set out facts which constitute a verbal agreement in relation to land, tending to create a trust contrary to the seventh section of the statute of frauds, and though

the evidence does show an agreement, the court will look to see if the consideration be paid and declare it a resulting trust. *Keller* v. *Kunkel*, 46 Md., 565.

A recent case in New Hampshire (*Converse* v. *Noyes*, 66 N. H., 570), well illustrates the proposition that equity will declare the existence of a resulting trust where a parol agreement of the parties, having in view similar results, has failed because of the statute.

A farm was conveyed to N by a deed of trust, the condition of which was that N should hold the premises during her life, and at her decease the title should vest in her heirs in fee. Later she conveyed her life estate to R. Her heirs, joining in the deed, also conveyed to R their reversionary interest for the sum of $2,000. The heirs signed the deed to R upon an agreement with N (their mother) that the title to the money received by her from the sale of the farm should remain the same as the title to the farm before the conveyance to R. Shortly afterward the heirs consented that their mother should purchase a lot of land, and pay therefor $1,500 of the money received from R, on condition that the title to the new property should be the same as the title to the farm. N took the deed of the new property in her own name, not mentioning the heirs, and paying for it from the R money.

N, before selling the farm, had married a second time. Upon her death her husband claimed the interest and income of one-third of the new property during his life-time. Her children brought a bill in equity to enforce a resulting trust, which they claimed was created in their favor from the fact that the new property had been bought with the money received from R for the farm.

CLARK, J. "The parol agreement alleged by the plaintiffs, that the title to the Penacook property should be the same as the title to the Shepard farm before the sale to Randall, is immaterial because if proved it would be ineffectual. 'No trust concerning lands, excepting such as

may arise or result by implication of law, shall be created or declared unless by an instrument signed by the party creating the same or by his attorney.' G. L., 135, sect. 13. When land conveyed to one person is paid for by or with the money of another a trust results to the latter, which is not within the statute of frauds. The ownership of the money may be shown by parol evidence. *Page* v. *Page*, 8 N. H., 187; *Hall* v. *Congden*, 56 N. H., 279; *Blodgett* v. *Hildreth*, 103 Mass., 484.

"The sale of the Shepard farm to Randall converted a trust estate into money which was held by Mrs. Noyes subject to the conditions of the trust imposed upon the land. As she had an estate for life in the land she had an estate for life in the money received for it; and as money does not belong to that description of property of which the use determines with the consumption, she was entitled to the income and interest only, and the money was the property of the owners of the reversion in the Shepard farm. *French* v. *Hatch*, 28 N. H., 331; *Healey* v. *Toppan*, 45 N. H., 243. The two thousand dollars received by Mrs. Noyes from Randall belonged to the plaintiff, subject to the right of Mrs. Noyes to the income during her life. With the assent of the plaintiffs Mrs. Noyes purchased the Penacook property with that money, and by reason of the ownership of the money a trust resulted in the favor of the plaintiffs, and from the facts stated in the bill they are the owners of the property."

That the *intention*, as between husband and wife, will be carried out by equity, even where at the time no money is paid by the former, but the understanding of the parties is plainly shown to the court, see the recent case of *Gray* v. *Jordan*. A husband bought a farm and had it conveyed to his wife, with the intention of paying for it himself. The wife gave her notes, secured by a mortgage of the land, and the husband afterward paid the notes out of his own money, in pursuance of an original intention, not intending the conveyance or the payment to be a gift to the wife. *Held*, a resulting trust in favor of the husband. 87 Me., 140.

So, in *Milner* v. *Freeman* (1882), 40 Ark., 62, where a husband had land, which he had paid for, put in the name

of his wife under the mistaken impression that it would vest a title in them jointly. They occupied the premises. The wife died childless, and her brothers and sisters claimed title. The husband was old and feeble, and did not expect to live long. The court decreed a trust on the ground that the husband did not intend an absolute gift to the wife. The fact that by agreement she was to occupy jointly with him did not in this case prevent a resulting trust to him, which upon her death sufficed to entitle him to be vested with the legal estate.

A husband bought land, having the deed made to his wife, upon an agreement that she would make a will devising the property to him. Upon the authority of *Livingston* v. *Livingston*, 2 John. Ch., 537, the Supreme Court of the District of Columbia held that a trust resulted to the husband. *Sherman* v. *Sherman* (1892), 20 D. C., 330. This decision is important as showing what has been the attitude of the court in this District, in such cases involving property rights.

No objection whatever in these instances was found in the fact that a parol agreement between husband and wife contemplated her having a certain interest or estate in the land.

A resulting trust rests upon a presumption of fact. This presumption may be affected by parol evidence to the extent of rebutting it in whole or in part. To rebut the presumption in part is not to destroy it.

In the case at bar the presumption is that Mrs. Avery held the land in trust for her husband, who had paid for it, and who had no intention of giving it to her outright. This presumption, however, is modified by the parol testimony, which shows that she was to enjoy it for her life. Such a limited beneficial interest does not prevent the fee of the land, as viewed in a court of equity, from being held by the husband.

We have proved that the holding of the land by Mrs.

Avery, as trustee for her husband, is not inconsistent with the terms of the agreement entered into between them at the time he bought the property. The beneficial estate vested in him immediately upon the purchase. A court of equity will execute the trust, and declare the title to have passed under his will to the complainants.

IT IS CONSTRUCTIVE FRAUD ON THE PART OF THE HEIRS TO CLAIM THIS LAND.

4. There is another ground upon which the complainant has a right to relief. As already suggested, we are entitled to invoke the broad principle that it is against equity and good conscience for the heirs of Mrs. Avery to claim this land. Because Mrs. Avery died without having divested herself of the strict legal title (as she had agreed to do, and intended to do), her heirs at law are using the strict legal title of record to get possession of property which, in equity and good conscience, does not belong to them. They have no other or better claim to this property than Mrs. Avery herself had. In their present attitude they must be treated precisely as Mrs. Avery would have been treated, had she in her lifetime presumed to convey the land in fee simple to a stranger.

Of course, Mrs. Avery, as a matter of fact, did not claim to be absolute owner. For her to have done so would have been to violate the trust and confidence reposed in her by her husband. Mrs. Avery had no thought of doing such a thing. It was her earnest desire and hope that the property should go to the Smithsonian Institution. Her heirs are to be regarded as her representatives; and their present conduct requires that the case be considered as if she *had* repudiated the agreement upon which the legal title had been put in her name.

Where one takes a conveyance for a lawful and specific purpose and attempts to retain the property in violation of

the agreement, in fraud of the real owner, equity will exercise its remedial power. *Carr* v. *Carr* (1873), 52 N. Y., 25. It makes little difference whether a remedy is afforded by way of enforcing a "constructive trust," or upon the general ground of preventing fraud, the jurisdiction of a court of equity to this end is well established.

"Constructive trusts," says Spence, "may arise not only where property has been acquired by fraud or improper means, but also where it has been fairly and properly acquired, but it is contrary to some principle of equity that it should be retained by the party in whom it is vested, at least for his own benefit. *1 Eq. Jurisd.*, sect. 511.

FRAUDULENT USE OF A DEED.

A familiar case is afforded where a grantee who is in possession under a deed, absolute in terms, that has been given really as a mortgage, undertakes to set up the instrument as an absolute conveyance. Here chancery takes jurisdiction, on the ground of a fraudulent *use* of the instrument. *Wright* v. *Bales*, 13 Vt., 349. This court has said that the object with which a deed is given constitutes a ground for the exercise of the jurisdiction of a court of equity "which will always be asserted to prevent fraud or oppression, and to promote justice." *Peugh* v. *Davis*, 96 U. S., 336.

It is not needful to bring forward many authorities to illustrate the ways in which chancery interferes to prevent fraud in this class of cases; one or two decisions, however, may properly be referred to.

If a grantee or devisee obtain a deed or devise by means of promises to hold the land for another, this is sufficient to raise a trust in favor of the latter on the ground of fraud, and this may be proved by parol. *Hoge* v. *Hoge*, 1 Watts, 163.

Defendant at a foreclosure sale purchased the property under a verbal agreement with the mortgagor that he should

buy the land for the mortgagor and hold it for his benefit. Upon bringing bill to enforce this agreement the statute of frauds was pleaded by the defendant. *Held*, that the statute is not to be used to defend fraud, and if one party executes a void contract relying on it, the other is bound as a trustee *ex maleficio* to execute it too. *Ryan* v. *Dox*, 34 N. Y., 301. The Chief Justice cites numerous authorities to the effect that one who receives a deed of real estate, in consideration of a verbal promise to hold it for the benefit of another person, is to be held as a trustee for such person.

CONFIDENTIAL RELATION OF HUSBAND AND WIFE.

A wife conveyed a lot of land to her husband on his verbal promise to hold and manage it for the benefit of their children. A bill by the children to execute the trust was sustained. It was held to be unnecessary to offer evidence tending to show that the husband did not intend to keep his promise when he received the deed. "He is presumed to have intended to do, when he obtained the property, what he finally did do." *Larmon* v. *Knight*, 140 Ill., 232.

Mr. Avery, we repeat, reposed a trust and confidence in his wife. This fact coupled with the circumstance that he paid the purchase money with no intention of giving the estate to her *and her heirs*, constitutes her heirs trustees of the legal title to convey it to Mr. Avery's devisees. The case falls within the principles so clearly enunciated in a leading decision in the New York Court of Appeals. A mother, upon an oral promise to hold the interest acquired and reconvey to him, induced her son, who had just come of age, to confess a judgment in her favor for $2,000, which sum she said that he owed her, but he said was a gift. She redeemed his land, and got a sheriff's deed of it, he thinking it to be for his protection. On demand and tender she refused to convey to him.

The court in a most carefully considered opinion by

ANDREWS, J., held that, on account of the confidential relation between the two, *and the parol agreement*, the son was entitled to relief, notwithstanding the statute of frauds. *Wood* v. *Rabe* (1884), 96 N. Y., 426.

"It was on the part of the son the case of a confidence induced not by the bare promise of another, but by the promises and the confidential relation conjoined. The confidence, in fact, had its spring and origin in the relation, and that relation was a controlling ingredient moving his action. It would be a gross wrong to permit that confidence to be betrayed, and we are of opinion that the statute of frauds cannot be invoked as a bar to relief. The principle that, when one uses a confidential relation to acquire an advantage which he ought not in equity and good conscience to retain, the court will convert him into a trustee, and compel him to restore what he has unjustly acquired, or seeks unjustly to retain, has frequently been applied to transactions within the statute of frauds. . . .

"The trust sought to be enforced in this case does not arise exclusively from the agreement, but from the agreement in connection with the other circumstances, the interest of the plaintiff in the land, the confidential relation of the parties, the fact that he acted without independent advice, and the injustice which would result in case the agreement should not be enforced. Therefore, without passing upon the question whether independently of the peculiar circumstances attending the agreement, it could be enforced in equity, we are of opinion that, upon the case as presented, the agreement, in connection with the circumstances, make out a case for relief, notwithstanding the statute. See *Heron* v. *Heron*, 2 Atk., 160; *Young* v. *Peachy*, id., 254; *Ryan* v. *Dox*, 34 N. Y., 307; *Perry on Trusts*, sect. 226."

Husband and wife purchased real estate, and title was taken in the name of the wife, upon an agreement that they should live on the land and together pay the purchase money, and that after it had been paid the wife should make a deed of an undivided half to her husband. The husband fully performed the agreement, but the wife con-

veyed the land to A without consideration. *Held*, on filing a bill, that husband had stated a good cause of action. *Gage* v. *Gage* (1894), 83 Hun., 362.

The principle of a trust springing out of the circumstances where the confidential relation of husband and wife exists, and a verbal agreement is relied on, is exemplified by the case of *Brison* v. *Brison*, 90 Cal., 323.

"The confidence which he had in his wife was the inducement which led him to place the property in her name. . . . While these acts, if the plaintiff had been dealing with a stranger, might not create an enforceable trust, yet with his wife they did; and her subsequent refusal to reconvey was not merely the breach of an agreement, but was the betrayal of a confidence, and the violation of a trust, constituting a constructive fraud, which a court of equity will remedy." Per HARRISON, J. (p. 336).

Plaintiff had conveyed real estate to defendant (whose wife was the niece and adopted daughter of plaintiff), on the promise by defendant to manage the property and reconvey upon request. Afterwards the defendant "conceived the design of claiming the same as his own." The court enforced the verbal agreement, giving weight to the fiduciary relations existing between grantor and grantee. *Alaniz* v. *Casenave*, 91 Cal., 41. To the objection that it did not appear that a fraudulent intent existed at the time of the conveyance, but on the contrary it did not exist, the court quotes from *Feeney* v. *Howard*, 79 Cal., 525:

"If by means of a parol promise to reconvey, a party obtains an absolute deed without consideration from one to whom he stands in a fiduciary relation, the violation of the promise is constructive fraud, although at the time of the promise there was no intention not to perform."

RULE WELL ESTABLISHED IN ENGLAND.

Where a defendant seeks to use the statute of frauds to keep property, which by reason of a parol agreement he

has no moral right to retain, the English court of chancery has not hesitated to take jurisdiction on the ground of fraud, and afford relief in spite of the statute. A leading case is *Haigh* v. *Kaye* (1872), 7 Ch. App., 469.

Plaintiff, fearing an adverse decision in a suit in chancery, conveyed an estate to the defendant (his brother-in-law) by absolute deed. No money passed. Plaintiff alleged that he conveyed to defendant as a trustee. Defendant admitted there was no consideration, and that it was understood he should account for the rents until he could make arrangement for paying the purchase money, and if no arrangement could be made he should re-convey. Defendant claimed to hold the estate discharged of any trust, and claimed the benefit of the statute of frauds.

The court below held that the statute did not apply, and that defendant was a trustee of plaintiff. The Court of Appeals affirmed the judgment.

"If a defendant means to say that he claims to hold property given to him for an immoral purpose, in violation of all honor and honesty, he must say so in plain terms, and must clearly put forward his own scoundrelism if he means to reap the benefit of it. . . . I apprehend it is clear that the statute of frauds was never intended to prevent the court of equity from giving relief in a case of a plain, clear and deliberate fraud." Per JAMES, L. J. (p. 474).

This is an instance, as the court stigmatizes it, of plain fraud. The court in argument refers to a similar ruling in *Davies* v. *Otty*, 35 Beav., 208, where one attempted to set up the statute of frauds who claimed under an absolute conveyance instead of a mortgage.

A recent decision, much in point, is *Davis* v. *Whitehead* (1894), L. R., 2 Ch. Div., 133. By an indenture, in 1890, the Duchess of Marlborough, in consideration of love and affection, assigned to her husband a leasehold house belonging to her. The deed was in form an absolute assignment.

This was done to enable the husband to mortgage it in his own name, and he did mortgage it, to pay his debts. The Duchess joined with the Duke in covenanting to pay the mortgage debt, but the equity of redemption was reserved to the Duke alone. The Duke died in 1892, and the Duchess claimed the house as her own, subject to the mortgage. She testified that her husband was to re-assign the house to her. "The understanding was that the house was mine."

In a creditor's action, plaintiff argued that the house should be treated as the Duke's estate, there could be no trust because of the statute of frauds.

The court, following the decision in *Haigh* v. *Kaye*, held that the statute could not be successfully pleaded.

"If the late Duke of Marlborough had in his lifetime refused to convey the equity of redemption at the request of the Duchess, I think he could not have set up the statute. Nothing of the kind ever happened; on the contrary, the evidence appears to show that he was willing and intended to re-convey, though unhappily he put off carrying his expressed intention into effect until it was too late. In my opinion the plaintiff, as claiming under him, is in no better position, and I think the inquiry should be answered by finding that the equity of redemption belongs to the defendant, the Duchess of Marlborough." *Per* TAYLOR, J. (page 146).

THE CASES CONTRA.

Such decisions as are to the contrary of our contention will be seen to be rested, one and all, upon the ground of a rigid adherence to the terms of the statute. Precisely the same reasoning is employed to uphold the statute in these cases as was used time and time again to resist the rule allowing parol testimony for the purpose of showing that a conveyance absolute on its face is really a mortgage, yet after a long struggle this salutary rule has been firmly established. Nobody questions its wholesome effect. See remarks of ALLEN, J., in *Carr* v. *Carr* (1873), 52 N. Y., 260.

OUR COURTS HAVE ADVANCED IN THEIR VIEWS AS TO TAKING JURISDICTION, AND AFFORDING RELIEF IN THIS CLASS OF CASES.

At this point we may pause for a moment to observe the tendency of our equity courts more readily to assume jurisdiction and administer relief, than formerly, in cases where constructive fraud would otherwise defeat the ends of justice. The struggle just referred to, in regard to mortgages that were in terms absolute conveyances, furnishes a valuable illustration of the growth of equitable remedy, in this important field.

The ground upon which jurisdiction is asserted in the case of an absolute deed given only as security, is that it is against equity and good conscience for the mortgagee to hold on to the land. It was only after years of contention that our courts would see in a transaction of this nature the means of working a fraud, and for that reason would afford a remedy. As yet the state courts are not altogether agreed as to the basis of their jurisdiction. *1 Jones on Mortgages*, 2d. Ed., sect. 321.

Some place it upon the ground of fraud or mistake. Others hold that the fact of a mortgage being intended (as evidenced by a loan of money) renders the transaction one of that class in respect to which equity takes jurisdiction growing out of the subject matter. They hold it to be of no consequence what the terms of the agreement may be between the parties, so long as it appears, from parol evidence, that the object in view is to secure the lender. Equity considers the character of the transaction rather than the specific terms of the agreement between the parties.

In this view it is argued that the nature of taking security is such as to put in the hands of the lender a means of inflicting injustice, that under the guise of a loan an absolute deed may be taken by way of extortion. Consequently it is a safe rule to accord to equity the power to investigate

all such dealings and, when the fact of a loan of money is proved, to assume jurisdiction to work out the rightful result.

This latter doctrine has the sanction of the Supreme Court of the United States. *Russell* v. *Southard*, 12 How., 139; *Peugh* v. *Davis*, 96 U. S., 332.

In three states, Ohio, Wisconsin and Texas, the courts say that the circumstances prove a trust; that the grantee is in equity a trustee for the grantor. This trust is founded upon the fraud that would be the result of a refusal on the part of the grantee to conform to what was the real purpose of the parties.

A few other states, including Vermont, uphold the theory that the fraud consists in the subsequent wrongful use of the deed. They maintain that it is open to prove by parol testimony that the transaction was really a mortgage. This not to contradict the deed, or to alter its terms, but to show the circumstances under which it was given, and thereby to show that a fraudulent use of the deed was subsequently made by the grantee.

This divergence of views is, perhaps, not to be wondered at. It was very difficult for the courts, made up of lawyers grounded firmly in the doctrines of the common law, to consent to make an inroad, as it were, upon the established doctrine of the statute of frauds. In yielding to this reform, each judge appears to have cast about for some reason or other to justify the new departure. Some of the arguments advanced in these opinions may, with all due respect, be characterized as specious and over subtle. They indicate a veiled unwillingness to come out and boldly state what is, after all, the only true ground upon which the decision could be put.

Notwithstanding the diversity in the opinions of these various tribunals that reach a common result, it is manifest that the real, underlying reason of each decision is fraud. By this term is not meant necessarily an actual fraud as

dealt with in most cases under that head. There need be no fraudulent intention on the part of the mortgagee at the time that the deed is taken; but his later action is held to be contrary to equity and good conscience, and to that extent is, in the view of the chancellor, fraudulent conduct.

CONTRARY DECISIONS NOT IN ACCORD WITH THE BETTER OPINION HERE, OR THE SETTLED RULE IN ENGLAND.

A leading case in which the view contrary to that we contend for, is ably argued is *Rasdall* v. *Rasdall* (1859), 9 Wisc., 391. The following extract from the opinion (COLE, J.), illustrates what we say of the character of the reasoning that has hitherto supported such conclusions:

"I can see no distinction between an express trust and a parol agreement making a deed a mortgage. If the refusal to abide by the latter is to be held on principle to be such a fraud as takes the case out of the rule and justifies parol evidence, I can see no reason why a refusal to execute an express trust evidenced only by parol should not be so held. The injustice, the wrong and the fraud are not only as great, but greater in the latter case than in the former. For in the former the party would only get the land for the money he had loaned, while in the latter he would get it for nothing. And if these cases are to be held correct upon principle, we can see no reason why the refusal by any party to perform a parol agreement, within the statute of frauds, should not be held such a fraud as would take the case out of the statute whenever such refusal would work hardship and injustice upon the opposite party. But we must say that we think these decisions cannot be sustained upon principle, and that if established by authority too firmly to be shaken, it must be regarded as an invasion upon the statute which cannot justify still further encroachment. And it is perhaps not so settled on authority as to be beyond question."

The real question at issue, it is plain to see, is, shall the statute of frauds be used as a cover for fraud? The de-

cisions in England, and as we believe the weight of authority in this country, are to the effect that equity has full power to deal with these cases of an attempt by means of the statute to perpetrate a fraud—and formulate its decree in each as it arises. In so doing a court of equity but preserves the spirit of the statute.

The trust that a court enforces, in order to protect a complainant against this species of fraud, is implied. It rests upon the fact that an attempt at fraud is proposed. The mere circumstance that the result reached is the same as if the court had enforced the parol agreement of the parties, is, after all, a coincidence merely. As Lord WESTBURY has well phrased it:

"The court does not set aside the act of Parliament, but it fastens upon the individual who gets the title under that act, and imposes upon him a personal obligation, because he applies the act as an instrument for accomplishing a fraud." *McCormick* v. *Grogan*, L. R., 4 E. & I. Appeals, 82.

CANNOT BE THAT MRS. AVERY SHOULD REPUDIATE HER AGREEMENT.

In granting relief against fraud the proof must satisfy the conscience of the chancellor or court. *I Story's Eq. Jur.* (12th Ed.), sect. 190 *a*. Here the chancellor has in no uncertain terms expressed his opinion as to the duty owed by Mrs. Avery to her husband.

"It is impossible to believe she would ever have attempted to repudiate this agreement if she had survived the husband without ascribing to her a moral delinquency inconsistent with her other conduct in the transaction and her respect and affection for her husband. . . . To retain the title and repudiate this promise under force of which it was obtained, would have been a fraud that equity would not have tolerated.

"As the wife, if living, upon the proofs here would be compelled by chancery to execute all needful conveyances

to confirm the title to the Institution, so the defendants who claim as her heirs-at-law have their consciences affected by the proofs and should be made to comply with the duty that devolved upon their intestate." (Rec., pp. 63, 64.)

We submit that this position is entirely sound.

COURT BELOW DOES NOT DENY THAT SUCH IS THE LAW.

It is to be noted that the Court of Appeals, which was unable to find in the testimony satisfactory proof that it was the money of Robert S. Avery and not that of his wife that was paid for the property, says that it does not "dissent from the statement of the law by the learned justice who heard this case in the court below, as contained in his very able and elaborate opinion which we find in the record; but we fail to find in the record the testimony which in our opinion is required to support it." (Rec., 74.)

That is to say, the appellate court, did not believe that the deed was made upon an understanding between husband and wife that she should dispose of the property at her death in accordance with the will of Mr. Avery, with the rest of his property (Rec., 41). It must have reached the conclusion that Mr. Shidy was mistaken.

We prefer to stand with Judge Hagner, who takes up the testimony in detail, and discusses it, and after remarking that "not a word of evidence in contradiction of the plaintiff's contention is offered in the part of the defendants (Rec., 64), declares it as his opinion that "it is impossible to read the testimony in this cause without becoming convinced that the contentions of the complainant's bill truly represent the case." (Rec., 62.)

III.

Mr. Cox is a Competent Witness.

There can be no possible objection to the competence of Mr. Cox as a witness.

His testimony as to statements made to him by both Mr. and Mrs. Avery in the presence of each other is undoubtedly admissible. There was no occasion for confidences as against each other, and both were inspired with the same purpose.

The rule of privileged communication does not apply to the case of husband and wife together consulting freely and harmoniously with an attorney for the purpose of drawing up their wills. *Gulick* v. *Gulick*, 38 N. J., Equity, 402; *Russell* v. *Jackson*, 9 Hare, 392; *Greenleaf's Law of Evidence* (15th ed.,) Vol. i, sect. 241, note *c*.

Where both parties are present at a time when a communication is made by one of them to his attorney or counsel, there is nothing confidential in the communication. *Whitney* v. *Barney*, 30 N. Y., 330.

"We have held, on more than one occasion, that there can be no privilege where both parties hear the communications, and where they are not made by a client confidentially to obtain counsel. *House* v. *House*, 61 Mich., 69, and cases cited. In the present case neither party sought Stellwagen separately or confidentially. Both went together, and counsel cannot very well represent, as such, two conflicting litigants. The case presents no features having anything to do with professional confidence. Neither made or expected to make any communication which was to be concealed from the other. Stellwagen should have been allowed to testify. Per CAMPBELL, C. J. *Cady* v. *Walker*, 62 Mich., 158.

An attorney at law who drew a declaration of homestead, and who was, at the time, apparently acting for the deceased and his wife in the matter, was interrogated on behalf of contestant as to whether the recital in the declaration of homestead was explained to Mrs. B., if she understood it, what explanation was given and what she knew about the matter. This was objected to, on the ground that it called for a privileged communication between attorney and client. The objection was sustained and the ruling excepted to.

The appellate court said:

"The objection should have been overruled. When two persons address a lawyer as their common agent, their communications to the lawyer, as far as concerns strangers, will be privileged, but as to themselves, they stand on the same footing as to the lawyer, and either can compel him to testify against the other as to their negotiation." *In re Bauer*, 79 Cal., 312.

IV.

The $1,000 Legacy to Defendants Has Been Forfeited.

The equity court rightly decided that the condition attached to the legacy of $1,000 was a valid one, and that the legatees had forfeited the bequest by claiming possession of the A street lot and putting the Smithsonian Institution to the expense of this suit.

The language of the will (Rec., 7) is as follows:

"I bequeath to the sister and brothers of my late wife one thousand dollars ($1,000), to be equally divided between them. I have already given these last over a thousand dollars which my wife inherited from her father, also clothing and other gifts, thus equalizing, substantially, my gifts to her family and to mine. These bequests are all made upon the condition that the legatees acquiesce in this will; and I hereby bequeath the share or shares of any disputing this will to the residuary legatee hereinafter named."

Mr. Roper says:

"When legacies are given to persons upon conditions not to dispute the validity of, or the dispositions in, wills or testaments, the conditions are in general not obligatory, but only *in terrorem*. If, therefore, there exist *probabilis causa litigandi* the non-observance of the condition will not be forfeiture. *Powell* v. *Morgan*, 2 Vern., 90; *Morris* v. *Burroughs*, 1 Atk., 404; *Lloyd* v. *Spillet*, 3 P. Wms., 344. The reason seems to be this: a court of equity does not

consider that the testator meant such a clause to determine his bounty, if the legatee resorted to such a tribunal to ascertain doubtful rights under the will, or how far his other interests might be affected by it; but merely to guard against vexatious litigation.

But when the acquiscence of the legatee appears to be a material ingredient in the gift, which is made to *determine* upon his controverting the will or any of its provisions, and in either of those events the legacy is given over to another person, the restriction no longer continues a condition *in terrorem*, but assumes the character of a *conditional limitation;* the bequest is only *quousque*, the legatee shall refrain from disturbing the will; and, if he controvert it, his interest will cease and pass to the other legatee." *Roper on Legacies*, Vol. i, p. 795.

"If the testator *direct* the legacy to fall in to the *residue* upon a breach of the condition and *dispose* of that fund, the *residuary legatee* will be a particular legatee of the individual legacy, and, as such, be entitled to it if the condition be broken. *Lloyd* v. *Branton*, 3 Meriv., 118." *Ibid*, 796.

THE TESTATOR IMPOSED A CONDITION UPON HIS BEQUEST.

His wife's relatives had no claim whatever upon the bounty of Mr. Avery, but desiring to equalize, substantially, his gifts to the family of his wife and those to his own relatives, he made the bequest. In order to guard against the danger of diminishing the Avery fund by bringing his will into litigation, the testator expressly enjoins that his bequests are made upon the condition that the legatees acquiesce in the will. He goes further. He bequeathes the share of any disputing the will to the Smithsonian Institution.

The language of the Court of Appeals on this point is as follows:

"With reference to the legacy of $1,000 given to the appellants by the testator Robert S. Avery, and which is

sought to be forfeited in this proceeding on account of the alleged disputing of the will by the appellant, it is not seriously controverted by the appellee that the decree of the court must be modified. Forfeiture is not greatly favored in equity under any circumstances; and this case is not one for the enforcement of a forfeiture. It may be suspected that the claim of the appellants to the property in dispute was the very thing against which the testator was solicitous to guard; but clearer and more unequivocal language for that purpose should have been used to justify a court of equity in decreeing a forfeiture in this case. Claiming property which it is contended did not pass under the will, and which we here hold did not pass under the will, cannot in any proper legal sense be regarded as a disputing of the will." Per MORRIS, J. (Rec., 74).

It is just possible that what is here said of the view maintained by us in respect to Judge HAGNER'S decree may lead to a misapprehension of the attitude of counsel in this particular. For this reason we take leave to quote from our brief before the Court of Appeals, as follows:

"The learned Judge below treated the legacy of $1,000 as a subject of forfeiture, and stated the conditions under which he would decline to 'enforce the forfeiture.' We are unable to adopt this view of the right of the Smithsonian Institution to the money given them in express terms, when the wife's relatives should refuse to acquiesce in the will. We conceive that no question arises here of enforcing a forfeiture. The court was asked to direct the executrix. This request was in the nature of seeking a construction of the will; or, to be more exact, it was praying the court to find as a *fact* that the defendants had disputed the will. The condition which the testator attached to the bequest executes itself. Equity not enforcing a forfeiture does not apply to a limitation over such as this. The doctrine is confined to conditions arising out of agreements, such as covenants in leases, or contracts generally.

"We submit that there was no room for the court below to give to the defendants this one thousand dollars upon their 'relinquishing their opposition.'

"Their refusal to conform to the suggestion of the opinion,

and their prompt appeal to this court works the same result as if the decree had declared the $1,000 payable to the Smithsonian Institution outright.

"We ask that the decree below be affirmed, except so far as this court shall see fit to modify it, so as to ensure our absolute title to the $1,000 in question."

THE CONDITION OF ACQUIESCING IN THE WILL HAS BEEN BROKEN.

The heirs-at-law (appellees) are far from acquiescing in Mr. Avery's will. They are disputing the devise of the A street lot, and at the same time claiming the $1,000 legacy. They have failed to observe the condition that the testator attached to his bequest to them. They are trying to diminish the amount of the Avery fund.

They cannot make a formal demand for possession of the A street lot, as against the plain language of the will, and at the same time hold on to this legacy. If their contention be true that the A street lot belongs to them, then obviously the doctrine of election applies. *Boughton* v. *Boughton*, 2 Ves. sen., 12; *Rogers* v. *Law*, 1 Black, 253. If their contention be unfounded, as we submit it is, they have nevertheless chosen to put the estate and the residuary legatee to the expense of this suit, and it is now too late to deny that they have not "acquiesced" in the will. They have made their election.

What "clearer and more unequivocal language" Mr. Avery could have employed (as is suggested by the Court of Appeals he should have done), we confess that we do not know. The will on the face shows that the testator is disposing, among other things, of a lot, the title to which stands in his wife's name (Rec., 7). He says distinctly: "These bequests are all made upon *the condition* that the legatee acquiesce in this will, and I hereby bequeath the share or shares of *any disputing* this will to the residuary legatee hereinafter named." Is this not plain enough?

Although unable to agree with the chancellor that he had power to permit the heirs to take the legacy on condition that they should relinquish their opposition to the claim of the A street lot, we heartily commend to the court the able presentation of the doctrine of conditions in wills, and election by a legatee, to be found in Mr. Justice HAGNER'S opinion (Rec., 64, 65). The question as to remitting a forfeiture, however, long ago dropped out of the case. We respectfully submit that the Court of Appeals fell into error in deciding that the appellees are entitled to the legacy.

For the reasons thus stated, we ask the court to reverse with costs the decree of the Court of Appeals, and to remand the cause to that court, with directions to affirm with costs the decree of the Supreme Court of the District of Columbia (Rec., 56, 57), except that it shall require the said Supreme Court to direct Julia N. Avery, executrix, to treat the one thousand dollars given to the appellees in this cause, as forfeited for breach of condition, and as having fallen into the residuum, and become payable to this appellant—the Smithsonian Institution.

FRANK W. HACKETT,
For Appellant.